

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL ASCHERL,

Plaintiff,

v.

CITY OF ISSAQUAH,

Defendant.

CASE NO. C11-1298 MJP

ORDER GRANTING PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION

This matter comes before the Court on Plaintiff's motion for a preliminary injunction and Defendant's motion for an extension of time. (Dkt. Nos. 3 and 10). Having reviewed the motions, the response (Dkt. No. 14), the reply (Dkt. No. 22), and all related filings, the Court GRANTS Plaintiff's motion for a preliminary injunction and DENIES Defendant's motion for an extension of time as moot.

Background

Plaintiff Paul Ascherl ("Ascherl") wants to distribute religious literature at the Salmon Days Festival held in Issaquah, Washington. (Dkt. No. 3-1, Ascherl Decl. ¶ 12.) The festival occurs every year on the first full weekend in October and is organized by the Greater Issaquah

1 Chamber of Commerce (“Chamber”) with support from the City of Issaquah (“the City”).
2 Ascherl alleges the City’s municipal laws prevent him from sharing his religious beliefs in
3 violation of the First Amendment. He seeks a preliminary injunction enjoining the City of
4 Issaquah from applying Issaquah Municipal Code 5.40.040 to prevent him and others from
5 engaging in literature distribution during the 2011 Salmon Days Festival.

6 The purpose of the Salmon Days Festival is to celebrate the return of the salmon and to
7 promote the City to visitors. (Dkt. No. 16, Kos Decl. ¶ 4.) Each year the City grants the
8 Chamber a special events permit for the festival and the Chamber, in turn, sells space along the
9 City’s streets and park facilities to temporary vendors. (Dkt. No. 21, Kelley Decl. ¶¶ 6-7.)
10 During the two-day event, the City closes parts of Front Street (from Dogwood Street to Newport
11 Way NW) and Sunset Avenue (from Newport Way to 2nd Ave NE) to vehicular traffic. (Id.)
12 The festival attracts an estimated 150,000 people. (Id. at ¶ 13.)

13 In 1999, the City felt it necessary to address pedestrian congestion issues caused during
14 the Salmon Days Festival. (Dkt. No. 19, Frisinger Decl. ¶¶ 8-9.) In previous years, political
15 candidates, including one traveling with a llama, carried large signs and repeatedly stopped
16 people to give them campaign literature. (Dkt. No. 19, Frisinger Decl. ¶ 3.) The year before, for
17 example, a political candidate brought a llama as a means of distributing campaign literature.
18 (Id. at ¶ 4.)

19 The City passed an emergency ordinance regulating conduct during the Salmon Days
20 Festival in 1999. (Id. at ¶ 9.) The emergency ordinance was followed by a permanent ordinance
21 passed in April 2000. (Dkt. No. 16, Kos Decl. ¶ 11.) As enacted, IMC 5.40.040 states:

22 “The City of Issaquah hereby establishes designated “expression areas” within
23 the festival area for leafleting, organized protesting, nonscheduled entertainment,
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1 and nonprofit distribution. These designated expression areas shall be located by
2 the Festival Events Division of the Greater Issaquah Chamber of Commerce in such
3 a way to minimize interference with the orderly flow of pedestrian traffic through
4 the festival area while still providing an area for members of the public to freely
5 express themselves. The locations of the designated expression areas shall be subject
6 to approval by the City Council prior to Salmon Days.”

7 Plaintiff argues IMC 5.40.040 violates the First Amendment on its face and as applied.
8 During the 2010 Salmon Days Festival, Ascherl alleges his First Amendment rights were
9 violated when he attempted to distribute religious literature last year near the intersection of
10 Front Street and NE Dogwood St. (Dkt. No. 3-1, Asherl Decl. ¶ 15.) After distributing literature
11 for five minutes, Pauline Middlehurst, a festival official ordered him to stop in 2010. (*Id.* at ¶
12 22; Dkt. No. 18, Middlehurst Decl. ¶¶ 3-6.) When Middlehurst left to get police, Ascherl
13 continued to distribute literature for thirty minutes. (Dkt. No. 3-1, Asherl Decl. ¶¶ 23-24.)
14 Eventually, the official returned with two Issaquah police officers who referred Asherl to IMC
15 5.40.040. (*Id.* at ¶¶ 23-29; Dkt. No. 17, Wilson Decl. ¶¶ 3-4.)

16 The police officers told Asherl that he would be sanctioned if he continued to distribute
17 literature outside designated free speech zones. (Dkt. No. 3-1, Asherl Decl. ¶ 29; Dkt. No. 17,
18 Wilson Decl. ¶¶ 3-4.) In 2010, festivals organizers had established two free speech zones. One
19 free speech zone was located close to the Front St. Stage where musicians were performing and
20 the other was located on West Sunset Way near the Issaquah Salmon Hatchery. (*Id.* at ¶¶ 30-33.)
21 Asherl attempted to distribute literature at both zones, but felt the first zone was too noisy and
22 therefore precluded effective dialogue with passerbys and the second was too isolated, with few
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1 people passing by at all. (Id.) Asherl discontinued his activities and left the Salmon Days
 2 Festival. (Id. at ¶ 35.)

3 Asherl seeks a preliminary injunction to prevent a similar incident when he returns to the
 4 2011 Salmon Days Festival and subsequent festivals to distribute literature.

5 **Discussion**

6 1. Preliminary Injunction

7 To obtain a preliminary injunction, Ascherl “must establish that he is likely to succeed on
 8 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 9 balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v.
 10 Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008).

11 a. Likelihood of Success on the Merits

12 Under First Amendment jurisprudence, courts analyze speech regulations depending on
 13 the forum: i.e., whether the forum is traditional, designated, or non-public. Perry Educational
 14 Association v. Perry Local Educators’ Ass’n, 460 U.S. 37, 103 (1983). Quintessential traditional
 15 public forums are sidewalks, streets, and parks. ACLU of Nevada v. City of Las Vegas, 333
 16 F.3d 1092, 1099 (9th Cir. 2003). In a traditional public forum, speech regulations are valid if
 17 they pass the “time, place or manner” test, i.e., if they (i) are content-neutral, (ii) narrowly
 18 tailored to serve a significant governmental interest, and (iii) leave open ample alternative
 19 channels for communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); see also
 20 Berger v. City of Seattle, 569 F.3d 1029, 1036 (9th Cir. 2009).

21 As an initial matter, there is no dispute that the Salmon Days Festival is held in a
 22 traditional public forum and IMC 5.40.040 is content-neutral. The City’s ordinance regulates
 23 conduct on streets and sidewalks and applies even-handedly to every organization or individual,
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1 which attempts to distribute literature during the Salmon Days Festival regardless of viewpoint.
2 The parties' dispute largely turns on the latter two requirements, i.e., whether the city ordinance
3 is narrowly-tailored to serve a substantial government interest and whether it leaves open ample
4 alternative channels for communication. The Court finds IMC 5.40.040 fails the requirement
5 that the statute be narrowly-tailored. Because the time, place, and manner requirement is
6 conjunctive, the Court need not reach the issue of alternative channels of communication.

7 i. Narrowly-Tailored

8 A regulation is "narrowly tailored" when it promotes a significant or substantial
9 government interest in a manner that would be achieved less effectively if the regulation did not
10 exist. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178 (9th
11 Cir. 2010). While a content-neutral regulation need not be the least-restrictive or least-intrusive
12 means of regulating speech to survive First Amendment scrutiny, see Ward, 491 U.S. at 710, the
13 government's interest must be based on more than conjecture. Weinberg v. City of Chicago, 310
14 F.3d 1029, 1034 (7th Cir. 2002).

15 The City argues IMC 5.40.040 is narrowly tailored to serve public safety concerns,
16 minimize congestion, and facilitate the orderly flow of pedestrian traffic during the festival. The
17 Court finds the City's argument unpersuasive. First, the City's identified interests are based
18 more on conjecture than reality. There is no evidence that leafleting by itself causes congestion
19 or prohibits the orderly flow of pedestrian traffic, let alone creates a public safety concern at the
20 Salmon Days Festival. The City's argument that the Salmon Days ordinance "targets precisely
21 the activity ... [Issaquah] seeks to legitimately ameliorate" is unpersuasive. (See Dkt. No. 15 at
22 11.) Although the City argues IMC 5.40.040 was enacted in response to "unacceptably
23 disruptive activities" that had occurred at past festivals, those activities related to political
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1 candidates carrying large signs, street musicians creating bottlenecks for pedestrian traffic, and
 2 balloon vendors and jugglers blocking store fronts. (See Dkt. No. 19, Frisinger Decl. ¶¶ 3-6; Dkt.
 3 No. 21, Kelley Decl. ¶ 15.) While one administrator testifies that people leafleting at the Salmon
 4 Day Festival causes people to slow down to accept handbills, stop and chat, bump into each
 5 other, and spill their drinks, there is no testimony that the City received any actual complaints
 6 about people leafleting. (Dkt. No. 16, Kos Decl. ¶ 8.) Even considering the possibility that
 7 many others will also choose to engage in Ascherl's proposed activity, as the City argues, the
 8 Court finds the distribution of literature from a fixed location is markedly less disruptive. Since
 9 the record does not show the City faced any pressing problems due to leafleting in prior Salmon
 10 Days Festivals, the Court finds the City fails to do more than assert interests that are important in
 11 the abstract. Turner Broad Sys. Inc. v. FCC, 512 U.S. 622, 664 (1994).

12 Second, the City's reliance on Heffron v. Internat'l Society for Kristna Consciousness to
 13 argue bans on literature distribution are upheld in the festival context, is inapposite. In Heffron
 14 v. Internat'l Society for Krishna Consciousness, the Supreme Court upheld a regulation limiting
 15 literature distribution during the Minnesota State Fair given that the regulation applied to a
 16 temporary event where "the flow of the crowd and demands of safety [were] more pressing."
 17 452 U.S. 640, 651 (1981). However, the Minnesota State Fair in Heffron was held in a limited
 18 public forum, i.e., on public fairgrounds where attendees were required to pay a fee for
 19 admission. Id.

20 In contrast, the Salmon Days Festival occurs on sidewalks and streets that remain open to
 21 the public. (Dkt. No. 3-1, ¶¶ 13-14.) As the Sixth Circuit observed in Saieg v. City of Dearborn,
 22 641 F.3d 727 (6th Cir. 2011), the government's interest in crowd control and safety is
 23 undermined when it leaves adjacent sidewalks open for typical non-Festival pedestrian traffic
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1 and sidewalk vendors that create just as much, if not more, congestion as compared to literature
2 distribution. Id. at 737. In Saieg, the Sixth Circuit struck down an ordinance that prevented a
3 Christian pastor from distributing religious literature on a sidewalk adjacent to a private
4 organization's Arab festival. Id. at 739. While the City attempts to dismiss Saieg as an out-of-
5 circuit case that does not apply the proper time, place, and manner test, the City's argument fails.
6 The Heffron court itself recognized "there are significant differences between a street and []
7 fairgrounds." Heffron, 452 U.S. at 651; see also N.A.A.C.P. v. City of Richmond, 743 F.2d
8 1346, 1355 fn. 8 (9th Cir. 1984)(observing Heffron made a distinction "between public streets
9 and the more limited public forum of a fairground"). Since the Salmon Days Festival occurs on
10 public streets that remain open for normal pedestrian traffic, the City's ordinance must be
11 narrowly-tailored to serve a substantial government interest.

12 Third, the City allows for much more congestive activities than leafleting during the
13 Salmon Days Festival, which undermines the credibility of its professed interest in minimizing
14 congestion and ensuring public safety. Based on this record, the City allows people to dress up
15 in animal costumes, carry large signs, purchase and eat food, and perform music on its
16 downtown sidewalks and streets. (Dkt. No. 22-1, Ascherl Decl., Ex. G.) All of these activities
17 are more likely to cause congestion than allowing Ascherl and others to distribute literature.
18 The City has other options to reduce congestion. For example, the City could increase the size of
19 the festival area to distribute participants over a large geographical area or the City could
20 lengthen the festival hours.

21 To the extent the City cites ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986),
22 and One World v. City and County of Honolulu, 76 F.3d 1009 (9th Cir. 1996), the City's
23 argument is misplaced. In ACORN, the City of Phoenix was concerned with individuals
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stepping into streets and soliciting funds from cars stopped at red lights. ACORN, 798 F.2d at 1262. The Ninth Circuit upheld the ordinance based on the government's interest in traffic flow and vehicular safety, but made a distinction between soliciting funds and distributing literature. Id. at 1268. To solicit funds, the court recognized a recipient must stop in order to receive the message and will often times "engender additional confusion ...because [the] act[] [involves] exchanging articles for money." ACORN, 798 F.2d at 1268 (citing Heffron, 452 U.S. at 665). In One World, the Ninth Circuit upheld an ordinance barring non-profits from setting up display tables so that they could sell T-shirts on Waikiki streets. 76 F.3d at 1011. The court upheld Honolulu's ordinance based on the government's interest in the aesthetic appearance of their communities and in protecting local merchants from unfair competition.

In contrast, distribution of literature is a much less disruptive activity than stopping cars in the streets and setting up temporary vendor stations. As recognized by the Supreme Court, "[t]he distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 690 (1992)(O'Connor, J., concurring). Courts routinely invalidate bans on literature distribution in traditional public forums. See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 690 (1992)(striking a regulation banning leafleting while upholding a ban on solicitation of funds in airports); Gerritsen v. City of Los Angeles, 994 F.2d 570, 577 (9th Cir. 1993)(invalidating a ban on literature distribution in city park because there was no evidence that handbill distribution interfered with park operations); Lederman v. United States, 291 F.3d 36 (D.C. Cir. 2002)(striking a regulation banning leafleting on a sidewalk near the Capitol Building).

As a final note, Plaintiff also argues IMC 5.40.040 is facially unconstitutional under the “overbreadth” doctrine. “An overbreadth claim is essentially a claim that a statute may be constitutional as applied to the plaintiff but sweeps so broad as to unconstitutionally suppress the speech of others not before the court.” Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 907 (9th Cir. 2007). Since the Court finds IMC 5.40.040 unconstitutional as applied to Ascherl, the Court need not reach the issue of whether the ordinance is void on its face.

The Court finds Plaintiff is likely to succeed on the merits of his First Amendment claim because IMC 5.40.040 is not narrowly tailored to address a substantial government interest.

ii. Ample Alternative Channels for Communication

The Court does not decide whether the restriction on leafleting leaves Ascherl with ample alternative methods of communication.

Any time, place, and manner restriction must leave open ample alternative channels by which speakers can communicate their messages. Ward, 491 U.S. at 791. While they are not entitled to the most effective means of communication, alternatives are not “ample” if the speaker is not permitted to reach the intended audience. Bay Area Peace Navy v. U.S., 914 F.2d 1224, 1229 (9th Cir. 1990).

Since the requirements for a time, place, and manner restriction are conjunctive and the Court already determined IMC 5.40.040 is not narrowly-tailored, the ordinance unconstitutional regardless if it leaves open ample alternative channels for communication.

b. Irreparable Harm

“[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.” Sammartano v. First Judicial District Court, 303 F.3d

1 959, 973 (9th Cir. 2002). The loss of a constitutional right to speak is both actual and imminent,
 2 and such loss results in irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). Here,
 3 Ascherl has established the existence of a colorable First Amendment claim. Since he would be
 4 continually prevented from exercising his First Amendment rights, the Court finds Ascherl will
 5 suffer irreparable harm without the injunction.

6 c. Balance of the Equities

7 The Court finds the balance of the equities also falls in Plaintiff's favor. Given that the
 8 safety and congestion concerns are likely speculative, the City is "in no way harmed by issuance
 9 of a preliminary injunction which prevents it from enforcing a regulation, which, on this record,
 10 is likely to be found unconstitutional." Newsom ex rel. Newsom v. Albemarle County School
 11 Bd., 354 F.3d 249, 261 (4th Cir. 2003).

12 d. Public Interest

13 The Court finds the public interest is not served by the continued enforcement of IMC
 14 5.40.040. "Courts considering requests for preliminary injunctions have consistently recognized
 15 the significant public interest in upholding First Amendment principles." Sammartano, 303 F.3d
 16 at 974. While the public interest in maintaining a free exchange of ideas has in some cases been
 17 overcome by a strong showing of other competing public interests (for example, the safety and
 18 security of a nuclear testing site), no such showing is made here. See, e.g., Hale v. Dep't of
 19 Energy, 806 F.2d 910, 918 (9th Cir. 1986).

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3 **Conclusion**

4 The Court GRANTS Plaintiff's request for a preliminary injunction because IMC
5 5.40.040 is unconstitutional as applied to Ascherl. By banning leafleting and permitting other
6 more congestive activities, the Court finds IMC 5.40.040 is not narrowly-tailored to serve a
7 substantial government interest. The City is enjoined from applying IMC 5.40.040 so as to
8 prevent Ascherl and other third-party speakers from engaging in literature distribution on public
9 sidewalks in downtown Issaquah during the 2011 Salmon Days Festival.

10 To the extent the City filed a motion for extension of time to file a responsive brief, the
11 Court DENIES the City's request as moot. The clerk is ordered to provide copies of this order to
12 all counsel.

13 Dated this 21st day of September, 2011.

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17 Marsha J. Pechman
18 United States District Judge
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